Nos. 11722, 11723, 11724, 11725, 11726

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

A. J. GOERIG AND CLYDE PHILP,

Appellants,

VS.

CONTINENTAL CASUALTY COMPANY,

A Corporation Appellee,

A. J. GOERIG AND CLYDE PHILP,

Appellants.

VS.

CONTINENTAL CASUALTY COMPANY, A CORPORATION, AND J. W. MORRISON, AN INDIVIDUAL, DOING BUSINESS AS J. W. MORRISON COMPANY,

Appellees.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, *Judge*

BRIEF FOR THE APPELLANTS

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FRAYN PRINTING COMPANY

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BRIEF FOR THE APPELLANTS

Jurisdictional Statement

These are appeals from five cases which were tried in the District Court of the United States for the Eastern District of Washington, Southern Division. Each of these cases was a suit under the Miller Act (49 Stat. 793 et seq.; 40 U.S.C.A. 270a,

270b), which provides that one who has furnished labor or material upon any Federal construction project, and who has not been paid by the principal contractor, may institute suit in the name of the United States for the amount due, regardless of the amount in controversy.

The Miller Act further provides that all principal contractors engaged in Federal work must furnish a payment bond for the protection of persons supplying labor and material in connection with such work.

In accordance with the foregoing terms of the Act, the nominal plaintiff in each of these five cases was the United States; but each case was instituted and prosecuted for the use and benefit of a particular subcontractor (hereinafter referred to as a "use plaintiff") who furnished labor and materials in connection with a Bureau of Reclamation irrigation project in Yakima and Benton Counties, in the State of Washington.

These appeals are being taken pursuant to the provisions of 28 U.S.C.A. 225 (26 Stat. 828, as amended).

The Parties

Not all of the parties named in the various complaints and cross-complaints which were filed in the Court below are parties to this appeal. We feel, however, that proper consideration of the points involved in this appeal requires a complete description

of the various parties who were involved in the lower court proceedings.

The use plaintiffs in the five cases now before the Court were supply companies or subcontractors who furnished labor and materials in the construction of the aforesaid irrigation project. Their complaints alleged failure to pay for labor and materials which had been furnished by them for use in the construction work.

One group of defendants consisted of certain partners doing business under the name Macri & Co. (sometimes referred to in the record as "Macri & Company" or "Macri Company."). The individuals who composed this partnership were Sam Macri, Joe Macri and Don Macri, hereinafter referred to as "the Macri partners" (Tr. 40). This partnership, on December 7, 1943, entered into a contract with the United States Bureau of Reclamation for the construction of a portion of the aforesaid irrigation project. Pursuant to the provisions of the Miller Act, as aforesaid, the partnership furnished a payment bond for the protection of persons furnishing labor and material in connection with this work. On May 18, 1944, the Macri partners entered into a second contract with the Bureau of Reclamation for the construction of an additional portion of the same project. A payment bond was also executed with respect to this contract.

In each of the several complaints it was charged

that the respective use plaintiff had furnished labor and materials to the Macri partners in connection with the carrying out of the above contracts, for which payment had not been made.

Additional defendants in the lower Court were the Appellants Clyde Philp and A. J. Goerig, a partnership doing business under the name of Goerig & Philip. These individuals were made defendants by virtue of the fact that during part of the period involved they had been engaged in a joint venture agreement with Macri & Co.

The remaining defendant was the Appellee Continental Casualty Company, an Indiana corporation (hereinafter referred to as "Continental"). This company, upon the application of the Macri partners, furnished the payment bonds required by the Miller Act, guaranteeing payment for the materials and labor furnished by the several use plaintiffs. Two of such bonds were furnished, each relating to one of the two contracts referred to above. Each of such bonds contained an indemnity clause providing that the principal on the bond would indemnify the surety for all costs and expenses incurred by the latter by reason of its surety commitments thereupon.

In each of the five cases Continental filed a cross-complaint against the Macri partners and against Goerig and Philp on the basis of the aforesaid indemnity provisions.

Certain other cross complaints were filed in the lower Court which are not material to this appeal and which, therefore, do not require discussion.

The Appellants herein, in all five cases, are Clyde Philp and A. J. Goerig. The Appellee, in all cases, is the surety, Continental Casualty Company. In one case, namely No. 11723, the use plaintiff is also made an Appellee.

Since the facts involved in the several appeals now before the Court differ somewhat, we deem it preferable to discuss each case separately. Case No. 11726 involves problems which are common to all of the other cases and for that reason will be discussed first herein. In discussing the remainder of the cases we will, for the purpose of brevity, refer from time to time to the applicable arguments made in Case No. 11726.

Case No. 11726

A. Factual Statement:

Case No. 11726 involves both the contract of December 7, 1943, and the contract of May 18, 1944. That is to say, part of the materials and labor furnished by the use plaintiff in this case were furnished in connection with the December 7 contract and part were furnished in connection with the May 18 contract.

(1) *Facts Relating to Contract of December* 7, 1943.

The contract of December 7, 1943 provided for the construction of a portion of the irrigation project which was referred to as Specification No. 1062. The contracting parties were the Bureau of Reclamation on the one hand and Macri & Co. on the other. It was specifically recited in the contract that Macri & Co. was a partnership consisting of Sam Macri, Don Macri and Joe Macri (Tr. 58-59).*

In connection with this contract, the Appellee, Continental Casualty Company, furnished a payment bond which guaranteed payment to all persons furnishing labor and materials, and which contained a clause providing that the principal on the bond would indemnify the surety for any payment which the latter might be required to make by reason of the defalcation of the principal. The application for this payment bond was made by Sam Macri, on behalf of the Macri Company. No other person signed the application (Tr. 79). In the body of the application there was a recitation to the effect that the full name of the applicant was the Macri Company (Tr. 67).

The bond itself was signed by Sam Macri, Don Macri and Joe Macri, each of the signatories designating himself as an individual principal. In

*All of the evidence which was introduced in the Trial Court is included in the transcript of Case No. 11722. Unless otherwise indicated, all transcript references herein refer to the transcript of that case. References to the transcripts of other cases will include both the case number and the transcript page thereof.

addition the bond expressly recited that the principals thereupon consisted of Sam Macri, Don Macri, and Joe Macri, who were designated as the partners in the firm of Macri & Company (Tr. 60-61).

Neither the contract nor the bond application or bond was signed by either Goerig or Philp, and at no place in any of these instruments is there to be found any indication or representation that any connection or relationship existed between the Macri partnership and these appellants.

On December 11, four days after the execution of the contract relating to Specification No. 1062, a joint venture agreement was entered into between the Appellants herein and the Macri partners. This joint venture agreement provided that the signatories would jointly perform the work called for under Specification No. 1062 and would share in the profits derived from such work. The agreement further provided that "as between the parties" the payment bond was to be considered as having been executed pursuant to the joint venture agreement (Tr. 92).

The above joint venture agreement was terminated by mutual consent of the parties thereto on July 15, 1944 (Tr. 108). This termination took place prior to the furnishing of any labor and materials by the use plaintiff in connection with the December 7 contract (Tr. 11726-20).

(2) *Facts Relating to Contract of May* 18, 1944

A second contract, relating to the portion of the work designated as Specification No. 1068, was entered into on May 18, 1944. The parties thereto were the Bureau of Reclamation on the one hand and the Macri partners on the other. The contract recited that Macri & Co. was a partnership consisting of Sam Macri, Don Macri and Joe Macri. (Tr. 62-63).

The Appellee, Continental Casualty Company, also furnished a payment bond with respect to the May 18 contract, similar in its provisions to the bond which was furnished in connection with the December 7 contract. The application for this bond was signed by Joe Macri on behalf of Macri & Co. (Tr. 72); and the application recited that the full name of the applicant was Macri & Co., which was described as being a partnership composed of Sam Macri, Don Macri and Joe Macri. (Tr. 80).

The bond which was furnished pursuant to the aforesaid application was signed by Sam Macri, who was described as being a "member of the firm" of the Macri Company (Tr. 63); and the bond expressly recited that the principals thereupon were Sam Macri, Don Macri and Joe Macri, who were designated as the partners in the firm of Macri & Co. (Tr. 64-65).

Appellants and the Macri partners also entered into a joint venture agreement which purported to relate to Specification No. 1068 (Tr. 100), which

was the portion of the work covered by the contract of May 18, 1944. This joint venture agreement was executed on the same date as the joint venture agreement covering the contract of December 7, 1943—that is, on December 11, 1943. The second joint venture agreement contained provisions similar to the first, with respect to the sharing of profits. It also contained a provision to the effect that "as between the partners" any bond relating to Specification No. 1068 should be considered as having been executed pursuant to the joint venture.

The second joint venture agreement, like the first, was terminated by mutual consent of the parties on July 15, 1944 (Tr. 108), prior to the furnishing of labor and materials by the use plaintiff (Tr. 11726-20).

(3) *Summary of Significant Dates*

By way of summarization the significant dates are set forth in the following table:

Contract Relating to Specification No. 1062

December 7, 1943—Date of principal contract between Macri Bros. and Bureau of Reclamation.

December 7, 1943—Date of bond application and bond—Macri partners as principals and Continental Casualty Company as surety.

December 11, 1943—Date of joint venture agreement.

July 15, 1944—Date of termination of joint venture agreement.

January 27, 1945 to May 5, 1945—Period of furnishing labor and materials by use plaintiff.

Contract Relating to Specification No. 1068

December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri & Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

January 27, 1945 to May 5, 1945—Period of furnishing labor and materials by use plaintiff.

B. The Judgment of the Lower Court:

In the instant case (11726) the lower Court entered judgment in favor of the use plaintiff and against the Macri partners, both with respect to the matters involved in the contract of December 7, 1943, and those involved in the contract of May 18, 1944. It was held, however, that the use plaintiff was not entitled to judgment as against Appellants Goerig & Philp (Tr. 11726—27-29).

Despite the fact that no recovery was allowed the use plaintiff as against Appellants Goerig & Philp, the Appellee, Continental Casualty Company, was awarded judgment on its cross-complaint not only as against the Macri partners but also as against the Appellants. The amount of this judgment, with respect to the contract of December 7, 1943 (Specification No. 1062), was $919.97, and with respect

to the contract of May 18, 1944 (Specification No. 1068), was $2,101.94. (Tr. 11726-27-29).

C. Specification of Errors Relied Upon:

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the futher reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the joint venture agreement between Appellants and the Macri partners was terminated prior to the time any labor and materials were furnished by the use plaintiff.

3. The Court erred in entering judgment against Appellants and in favor of Continental in connection with the contract of December 7, 1943, for the reason that the joint venture agreement was entered into after the payment and indemnity bond had been furnished by Continental. Accordingly, Appellants were not parties to any contract of indemnity; and assuming that the joint venture agreement was a contract for the benefit of Continental, then Continental nevertheless has no right to recover thereupon because the joint venture

agreement was terminated prior to any acceptance or act in reliance thereupon by Continental.

4. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants were held to be not liable to the use plaintiff for the materials and labor furnished by him; and, accordingly, Appellants may not be held liable to Continental because an indemnitor may not be held liable to his indemnitee where the acts of the former did not cause payment by the latter under the surety clause.

The foregoing specifications are included in the statement of points on appeal which is set forth at page 34 of the Transcript of Record in case No. 11726.

D. Summary of Argument:

(1) With respect to both the December 7, 1943, and the May 18, 1944, contracts the bonds were furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit

or performance of the person who applies for the bond and may look only to him for indemnity.

(2) Appellants terminated their joint venture agreements with the Macri partners prior to the furnishing of labor and materials by the use plaintiff, either with respect to the December 7, 1943 contract, or the May 18, 1944 contract. A partner is not liable for the acts of his former partners which take place subsequent to the dissolution of the partnership. Since the relationship between Appellants and the Macri partners was secret, and the Appellants were merely dormant partners, it was not necessary for them to give notice of the termination or dissolution of the joint venture agreement. Accordingly, the lower Court correctly held that there was no liability in favor of the use plaintiff and against Appellants. It follows that Continental has no right of action over against these Appellants, for it is well settled that a judgment of dismissal against an indemnitor precludes the surety from recovering over against him.

(3) With respect to the contract of December 7, 1943, the joint venture agreement between Appellants and the Macri partners was not entered into until after the execution of the contract and after the execution of the bond application and bond which related to that contract. There was, therefore, no privity of contract between Appellants and Continental, and there was no evidence of any

basis of estoppel against Appellants. At most, the joint venture agreement was a contract for the benefit of Continental which was rescinded prior to any acceptance or act by Continental in reliance thereupon. It is well settled that under such circumstances the third party beneficiary has no right of recovery.

E. Argument:

(1) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT APPELLANTS WERE NOT PARTIES TO THE INDEMNITY CONTRACT UPON WHICH APPELLEE'S ACTION IS BASED.

We submit that the lower Court erred upon several grounds in awarding judgment in favor of Continental and against Appellants Goerig and Philp. One primary basis which requires reversal consists of the fact that the Appellants were not parties either to the bond or the bond application upon which Continental must rely to sustain its action for indemity. It is true that in connection with the contract of May 18, 1944, the joint venture agreement between Appellants and the Macri partners was in existence at the time of the execution of the bond application and bond. However, the bond was issued by Continental solely upon the personal application of the Macri partners. Appellants did not appear upon the bond application and they committed no act which might be claimed to have caused Continental to rely upon their security.

We may concede that in an ordinary partnership arrangement one partner is liable upon contracts entered into by another partner. This is not true, however, with respect to indemity contracts. It has been held that a surety relies solely upon the security of the one who executes the bond application and bond, and must look only thereto for indemnity. This rule has been applied, even in cases where the person who executes the bond application is acting as agent for others. A case in point is *Southern Surety Co. v. Plott,* (CCA 4, 1928), 28 F. 2d 698. In that case it appeared that certain partners had entered into a contract with the State of North Carolina for the construction of a road. One of the partners, namely Plott, obtained a bond from the plaintiff on his personal application. The bond guaranteed performance of the contract and contained a clause providing for the indemnity of the bonding company in the event of being required to make payment. The partners abandoned the contract after construction had been commenced and the plaintiff was required to complete the work in accordance with the contract. The plaintiff thereupon sued all of the partners on the indemnity provision, alleging that Plott had obtained the bond as agent for the partnership. The Court held that the plaintiff had no right of recovery against the partners other than Plott, declaring (p. 698):

"The principle that a surety can look only to

> the principal who signs the bond is supported by numerous decisions."

The Court thereupon discussed numerous decisions which supported its decision and quoted from numerous text authorities, including, for example, the following quotation from *Childs on Suretyship* (p. 699):

> "The mere fact that a principal is jointly liable with others for the debt will not give a surety any right against such others, if they are not actual parties to the contract."

Discussing the materiality of the knowledge of the bonding company of the existence of the partnership, the Court in the above case, quoting from an early decision of the United States Supreme Court, declared (p. 700):

> "If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal."

See also *U. S. v. Ames,* 99 U. S. 35, 25 L. Ed. 295, and *Waterman v. Alden,* 143 U. S. 196, 12 S. Ct. 435, 36 L. Ed. 123.

The rule announced above is applicable both to the contract of Dec. 7, 1943, and that of May 18, 1944, for in neither case were Appellants parties to the bond or bond application. Accordingly, upon this ground, as well as upon the several additional grounds discussed below, the judgment in case No. 11726 must be reversed.

(2) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE JOINT VENTURE AGREEMENT HAD BEEN TERMINATED AND DISSOLVED PRIOR TO THE TIME OF FURNISHING LABOR AND MATERIALS TO USE PLAINTIFF.

A second reason which requires reversal of the judgment of the lower Court is the fact that Appellants, by termination of the joint venture agreements, had withdrawn from any relationship with the Macri partners prior to the time the latter had been furnished any labor and materials by the use plaintiff in this case. Because of this fact the Court dismissed the action of the use plaintiff against Appellants. The reason for the Court's decision in this regard was the fact that the joint venture agreement between the Macri partners and Goerig and Philp had been terminated prior to the time the use plaintiff delivered labor and materials either in connection with contract No. 1062 or contract No. 1068.

Despite the fact that the Court held that Appellants were not liable to the use plaintiff for the furnishing of such labor and materials, it was held that when Continental became liable to pay for such labor and materials on the basis of the payment bond, it was thereupon entitled to maintain an action over against Appellants to recover the amount of such payment. A judgment against Appellants was entered upon this theory. We submit that such

judgment, being wholly inconsistent, is clearly erroneous.

(*a*) *The lower Court was correct in dismissing the action of use plaintiff against Goerig and Philp.*

Clearly the dismissal of the original action as against Appellants was correct. The relationship of parties to a joint venture agreement is so similar to that of partners that the duties and liabilities are generally tested by the same rules in each case. *Paulson v. McMillan,* 8 W. 2d 295, 111 P. 2d 983. Accordingly, since no partnership or joint venture relationship existed at the time of the dealings between the use plaintiff and the Macri partners there was no ground for recovery against Appellants Goerig and Philp, in the absence of some basis of estoppel. As said in *Lowenstein v. Whitelaw,* 178 Wash. 428, 34 P. 2d 1108 (p. 1109):

> "One is liable to third persons as a partner only when a partnership actually exists, or when, by his conduct, he is estopped from denying it."

Similarly, in the absence of an estoppel, a retiring partner is not liable for goods sold to his associate after dissolution of the partnership. *Jones v. Davis,* 153 Wash. 186, 279 Pac. 405. It is true, of course, that where a third party extends credit to a partnership the individual partners may not divest themselves of liability simply by withdrawing from the partnership. In such case notice of the dissolution of the partnership must generally

be given. In the case at bar, however, a somewhat different rule is involved because of the fact that the Appellants Goerig and Philp were dormant or silent partners. This was true not only in case No. 11726 but also in the remaining four cases now before the Court. The record clearly demonstrates that the fact of the joint venture relationship between Appellants and the Macri partners was not made known to any of the use plaintiffs or to the bonding company or to any other party or parties concerned in the project. The contracts, bond applications and bonds were all signed by the Macri partners, without disclosure of the fact that a joint venture arrangement with Goerig & Philp was in existence or contemplated. During the period involved in these cases Appellants Goerig and Philp maintained an office in Seattle, Washington, some distance from the office of the Macri partners. All of the work in connection with the project was carried out by the Macri partners (Tr. 106). Neither Goerig nor Philp ordered or requested any labor or materials to be furnished for use upon the project (Tr. 26-29). Moreover, there is no evidence whatsoever in the record to the effect that either Goerig or Philp ever performed any act indicative of a partnership or joint venture arrangement prior to the time of its termination.

It should also be observed that even if we assume that Appellants were parties to the bond of May 8,

1944, by reason of the joint venture agreement which then existed, then their participation upon such bond was purely that of dormant partners. As such, as is demonstrated by the principles discussed below, they could terminate their relationship with the Macri partners before the accrual of liability without the necessity of notice of such termination.

The law is well established that where, as in the case now before the Court, a partnership includes a dormant partner, the latter may divest himself of liability for further debts of his associates simply by terminating the partnership. It is not necessary to give notice of dissolution in such case. In this connection, it is stated in 40 Am. Jur. p. 260 (Sect. 188) that a dormant partner

> " . . . is not liable to persons not knowing him to be a partner, for transactions carried on in the name of the firm, after he has ceased to be a partner."

And in 40 Am. Jur. p. 309 (Sect. 259) it is declared:

> "Notice of the retirement of a dormant partner must be given only to those who had some knowledge of his connection with the partnership before his retirement. Inasmuch as he owes no duty of publicity to strangers having no knowledge that he was a member of the partnership, he may retire therefrom without giving notice to the world. The reason for this distinction rests on the presumption that those who knew of his membership in the firm were the only ones who gave credit to the firm relying on this relationship."

See also: *Collyer v. Egbert,* 200 Wash. 342, 93 P. 2d 399; 47 C. J. pp. 985, 1035, 1137.

In view of the above rule it is clear that the lower Court was correct in holding that Appellants were not liable to the use plaintiff.

(*b*) *If Appellants were not liable to the use plaintiff, they could not be liable to Appellee.*

We submit that if the use plaintiff in this case had no action against Appellants Goerig and Philp then it follows as a necessary corollary that Continental had no action against these Appellants. The recovery by use plaintiffs as against Continental was based upon a liability incurred by the Macri partners. This recovery was not based upon any liability incurred by Appellants Goerig and Philp. In view of the fact that Continental was not required to provide any indemnity as a result of any act of Goerig and Philp, we submit that there was no possible basis for concluding that Continental can maintain any action as against these Appellants. In short, Appellants Goerig and Philp imposed no liability upon Continental and, therefore, there can be no justification in requiring them to indemnify Continental.

The basis of recovery by Continental in all of these cases was the indemnity clause in the bond application. Certainly an indemnity clause cannot afford a basis of recovery against one who causes no liability to be imposed upon a surety. In this case the action by the use plaintiffs failed as to Appellants Goerig and Philp. It follows that the

surety has no right of recovery against these Appellants. It is well settled that an insurer or surety may not recover over against an indemnitor whose acts have been held not to have caused the liability for which recovery has been had against the surety. A case in point in *Seattle v. Erickson,* 99 Wash. 543, 169 Pac. 985. In that case a contractor entered into a contract with the City of Seattle for the construction of a certain street. The contract provided that the contractor would indemnify the City for all sums paid by the city as a result of actions or suits brought on account of acts of the contractor in the performance of the work. A person who was injured by the condition of the street, during the performance of the contract, brought an action for damages against the City and the contractor. The trial resulted in a dismissal as to the contractor but an award of damages was made as against the City. Thereupon, after paying the judgment, the City instituted an action over against the contractor to recover the sum which it had been compelled to pay. The lower Court entered a judgment of dismissal and this judgment was affirmed by the Supreme Court. The Court declared (p. 986):

> It clearly appears from the record that in the prior action against the appellant and the respondent jointly for the negligent injury to Mary Jones the respondent was affirmatively exonerated from liability and the appellant was held for the negligence. Consequently there is now an estoppel by judgment against

> the right of the appellant to assert that the respondent is liable over to it for the amount of the recovery in favor of Mary Jones.

See also, to the same effect: *Seattle v. Northern Pac. R. Co.,* 63 Wash. 129, 114 Pac. 1038; *Seattle v. Northern Pac. R. Co.,* 47 Wash. 552, 92 Pac. 411.

This Court has followed the above rule in the case of *Town of Flagstaff v. Walsh* (C.C.A. 9, 1925) 9 F. 2d 590. In that case the facts were as follows: The Town of Flagstaff had entered into a contract with a certain partnership for the construction of a sewer. The partners agreed to indemnify the Town for any liability accumulating to it as a result of their performance of the contract by the partnership. In an action brought against the partnership and the Town, for alleged negligence in the performance of the work, a recovery was had as against all defendants. Upon appeal, however, the judgment against the partnership was reversed and on the second trial a judgment was entered in favor of the partnership. The Town did not perfect its appeal and was required to pay the judgment. The Town thereupon brought an action against the partnership and the bonding company on the indemnity provision of the contract. This Court affirmed the judgment of the lower Court in favor of the defendants, declaring that the judgment in the previous case was a defense to the subsequent action for indemnity. The Court pointed out that a showing of liability on the part of the partnership

was a condition precedent to recovery on the indemnity provision.

Similarly, in the case at bar, a showing of liabiltiy on the part of Appellants, which in turn would impose liability upon the surety, is a condition precedent to recovery by the surety on the indemnity provision.

Another case to the same effect is *Buell v. Hall,* 169 Okla. 394, 37 P. 2d 308. That case arose from an action against H. & B., as individuals. The defendants had formerly been associated together in a partnership. Judgment was entered against H. but not against B. Then H. sought to recover over against B., alleging that the judgment which was entered was actually upon a partnership debt. It was held that the judgment in the prior case conclusively determined that the judgment was upon an individual debt and that consequently H. had no right of action over.

The rule applied in the above case has been well stated in the case of *American Surety Co. v. Singer Sewing Mach. Co.,* (D.C.S.D.N.Y., 1937) 18 Fed. Supp. 750. In that case it was held that a bonding company had no right of action over against an indemnitor who had been held not liable in the original action. The Court stated the rule as follows (p. 753):

> "Where an indemnitee has been held liable in an earlier action brought against him by a third party and later brings suit to recover

> against an indemnitor for the loss so sustained, the indemnitee is concluded as to facts established against him in the earlier action, and if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor, the later action against the indemnitor may not be successfully maintained."

See also *Fidelity & Casualty Co. v. Minneapolis Brewing Co.,* 214 Minn. 436, 8. N. W. 2d 471; 42 C. J. S. Page 619 (Section 32b).

In view of the above principle it is clear that no liability was imposed upon Continental by reason of any act of Appellants Goerig and Philp. We submit that it follows there is no basis for a recovery by Continental as against these Appellants, either with respect to the contract of December 7, 1943, or that of May 18, 1944. Accordingly, the judgment against these Appellants should be reversed.

(3) WITH RESPECT TO CONTRACT OF DEC. 7, 1943, THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS BECAUSE THE JOINT VENTURE AGREEMENT WAS EXECUTED SUBSEQUENT TO THE BOND AND BOND APPLICATION AND BECAUSE APPELLEE WAS NOT A PARTY TO THE JOINT VENTURE AGREEMENT AND NEVER ACCEPTED IT OR ACTED UPON IT.

With respect to contract of Dec. 7, 1943 (Specification No. 1062) the action by Continental against all the cross-defendants was based upon the indemnity provision in the bond application of Dec. 11, 1943. The Appellants Goerig and Philp were not parties to this application or to the bond issued

pursuant thereto.. It can certainly not be contended that these Appellants were parties to the bond by reason of the execution of the joint venture agreement, for the latter agreement was executed four days after the execution of the bond.

It is true that in the joint venture agreement the parties agreed that the bond was to be treated as being executed pusuant to the joint venture agreement, but this agreement was only "as between the parties" to the agreement. Continental was not a party to the joint venture agreement. There was no privity of contract between Appellants and Continental, and no consideration passed from Continental to Appellants. Moreover, since the bond was executed prior to the joint venture agreement, Continental could not have relied upon any act of Goerig and Philp in the execution of the bond. It is well settled that

> " . . . a promise of indemnity is void for want of consideration where made after the execution of the sureties' undertaking." 50 Am. Jur. 1092 (Sect. 284).

Moreover, there is no evidence of any representation either oral or written, by Goerig and Philp upon which Continental could claim to have acted in executing the bond. In short, Continental relied upon and bargained for a contract with the Macri partners. Its contract was with those partners. There was no contract between Continental and Goerig and Philp and no ground or basis of estoppel

between these parties. Continental did not seek, bargain for or obtain any contract of indemnity with Goerig and Philp. We submit that there is no principle of law which could possibly permit Continental to recover upon a contractual promise which was never made to them. It is basic law that one who is not a party to a contract may not ordinarily recover thereupon.

It might be argued that the joint venture agreement was a contract for the benefit of a third party and that Continental may recover as the beneficiary thereof. This argument must fail however, for the reason that Continental was only an incidental beneficiary and under Washington law a beneficiary of this type has no right of action upon the contract. *Ridder v. Blethen,* 24 W. 2d 552, 166 P. 2d 834. Moreover, even if we should concede that Continental was the type of beneficiary entitled to recover under the joint venture agreement, this still would not entitle it to a recovery in the instant case. It is well settled that where parties enter into a contract for the benefit of a third party they may determine or rescind such contract prior to the time the third party has accepted the contract or changed his position in reliance thereupon. The rule is stated in 12 Am. Jur. Page 843 (Sect. 290) as follows:

> "According to the weight of authority, the parties to a contract entered into for the benefit of a third person may rescind, vary, or abro-

> gate the contract as they see fit, without the assent of the third person, at any time before the contract is accepted, adopted, or acted upon by him, and such rescision deprives the third person of any rights under or because of such contract."

There have been no cases decided by the Supreme Court of the State of Washington which directly involve the right of parties to rescind a contract prior to acceptance or adoption thereof by a third party beneficiary. However, the Washington Court, by a clear implication, has adopted the general rule as announced above. *Huston v. Washington Wood & Coal Co.,* 4 W. 2d 449, 103 P. 2d 1095. See also: 53 A.L.R. 178. In view of these authorities, Continental has no basis for recovery against these Appellants with respect to the contract of December 7, 1943.

F. Conclusion:

We submit that the above authorities conclusively establish that in case No. 11726 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

Case No. 11725

A. Factual Statement:

Case No. 11725 is factually similar to case No. 11726, which has been considered above. The use plaintiff in No. 11725 was a supply company which had furnished materials to Macri & Co. in connection with the irrigation project referred to

above,, and which had not received payment therefor. The defendants, as in No. 11726, were the Macri partners, Appellants Goerig and Philp, and the Continental Casualty Co.

The Continental Casualty Co., as in the case previously discussed, filed a cross-complaint against the Macri partners and against Appellants Goerig and Philp upon the basis of the indemnity provision contained in the bond applications.

The material furnished by the use plaintiff was supplied in connection with the same contracts as were involved in No. 11726, namely, the contract of December 7, 1943, and the contract of May 18, 1944. Similarly, the bond applications and bond involved in No. 11725 are the same as were involved in No. 11726.

The same is true with respect to the joint venture agreements and the contract terminating these joint venture agreements.

These instruments have been discussed in detail in the foregoing consideration of No. 11726 (p. 5-9, Sect. A(1) (2)).

By way of summarization, the significant dates in No. 11725 are set forth in the following table:

Contract Relating to Specification No. 1062

December 7, 1943—Date of principal contract between Macri Bros. and Bureau of Reclamation.

December 7, 1943—Date of bond application and bond—Macri partners as principals and Continental Casualty Company as surety.

December 11, 1944—Date of joint venture agreement.

July 15, 1944—Date of termination of joint venture agreement.

April 19, 1944, to February 24, 1945—Period of furnishing labor and materials by use plaintiff.

Contract Relating to Specification No. 1068

December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri & Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

December 4, 1944, to August 18, 1945—Period of furnishing labor and materials by use plaintiff.

It will be noted from the above table that delivery of materials in connection with the contract of December 7, 1943, was commenced a short time prior to the agreement between the Macri partners and Appellants terminating the joint venture agreement. We deem this fact immaterial, however, in the light of the decision of the lower Court as set forth in the next section of this brief.

B. The Judgment of the Lower Court:

In case No. 11725 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners. It was held, however, that the use

plaintiff was not entitled to judgment as against Appellants Goerig and Philp (Tr. 11725-31-33).

Despite the fact that no recovery was allowed the use plaintiff as against the Appellants Goerig and Philp, the Appellee, Continental Casualty Co., was awarded judgment on its cross-complaint not only as against the Macri partners but as against the aforesaid Appellants. This judgment was in the amount of $11,941.51. This amount related solely to the contract of May 18, 1944 (Specification No. 1068), payment having been completed by the Macri partners with respect to all materials furnished under the contract of December 7, 1943 (Specification No. 1062). (Tr. 11725-27).

C. Specification of Errors Relied Upon:

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the further reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the materials furnished by use plaintiff for which payment was not made were supplied in connection with the contract of May 18, 1944 (Speci-

fication No. 1068), and the joint venture agreement between Appellants Goerig and Philp and the Macri partners was terminated prior to the furnishing of materials in such connection.

3. The Court erred in entering judgment against Appellants and in favor of Continental in connection with the contract of December 7, 1943, for the reason that the joint venture agreement was entered into after the payment and indemnity bond had been furnished by Continental. Accordingly, Appellants were not parties to any contract of indemnity, and assuming that the joint venture agreement was a contract for the benefit of Continental, then Continental nevertheless has no right to recover thereupon because the joint venture agreement was terminated prior to any acceptance or act in reliance thereupon by Continental.

4. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants were held to be not liable to the use plaintiff for the materials and labor furnished by him; and, accordingly, Appellants may not be held liable to Continental because an indemnitor may not be held liable to his indemnitee where the acts of the former did not cause payment by the latter under the surety clause.

The foregoing specifications are included in the statement of points on appeal which is set forth at

page 37 of the Transcript of Record in case No. 11725.

D. Summary of Argument:

(1) With respect to both the December 7, 1943, and the May 18, 1944 contracts the bonds were furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit or performance of the person who applies for the bond and may look only to him for indemnity.

(2) There was no liability to use plaintiff with respect to the contract of December 7, 1943. With respect to the contract of May 18, 1944, materials were not furnished by the use plaintiff until after the termination of the joint venture agreement between the Appellants and the Macri partners. A partner is not liable for the acts of his former partners which take place subsequent to the dissolution of the partnership. Since the relationship between Appellants and the Macri partners was secret, and the Appellants were merely dormant partners, it was not necessary for them to give notice of the

termination or dissolution of the joint venture agreement. Accordingly, the lower Court correctly held that there was no liability in favor of the use plaintiff and against Appellants. It follows that Continental has no right of action over against these Appellants, for it is well settled that a judgment of dismissal against an indemnitor precludes the surety from recovering over against him.

(3) As indicated above, it was held by the lower Court that there was no liability to use plaintiff with respect to the contract of December 7, 1943. Accordingly there can be no basis for a judgment over in favor of Continental with respect to this contract. Moreover, the joint venture agreement between Appellants and the Macri partners was not entered into until after the execution of the December 7, 1943 contract and after the execution of the bond application and bond which related to that contract. There was, therefore, no privity of contract between Appellants and Continental and there was no evidence of any basis of estoppel against Appellants. At most the joint venture was a contract for the benefit of Continental which was rescinded prior to any acceptance or act by Continental in reliance thereupon. It is well settled that under such circumstances the third party beneficiary has no right of recovery.

E. Argument:

(1) The Court Erred in Entering Judgment

AGAINST APPELLANTS FOR THE REASON THAT APPELLANTS WERE NOT PARTIES TO THE INDEMNITY CONTRACT UPON WHICH APPELLEE'S ACTION IS BASED.

As indicated above, the contractual instruments involved in case No. 11725 are the same as those involved in case No. 11726. It is our position that since Appellants Goerig and Philp were not parties to the contracts, or to the bond applications or bonds, there is no basis for any judgment against them. In this connection, the argument heretofore made at p. 14-16, sect. E (1) of this brief is fully applicable and we hereby incorporate the said section herein by reference.

(2) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE JOINT VENTURE AGREEMENT HAD BEEN TERMINATED AND DISSOLVED PRIOR TO THE TIME OF FURNISHING LABOR AND MATERIALS TO USE PLAINTIFF.

As indicated above, the lower Court held that there was no liability in favor of use plaintiff with respect to the contract of December 7, 1943. With respect to the contract of May 18, 1944, the joint venture agreement between the Macri partners and Appellants had been terminated prior to the time of furnishing materials. Since a dormant partner is not liable for the acts of his former associates after his withdrawal from a partnership, the lower Court correctly dismissed the action of the use plaintiff as against Appellants Goerig and Philp; and since

these Appellants were not liable to the use plaintiff it follows that they could not be liable to the surety on the indemnity clause of the bond application. In this connection, the argument made hereinabove at p. 17-25, Sect. E (2) (a) and (b) is fully applicable and we hereby incorporate the said sections herein.

(3) WITH RESPECT TO THE CONTRACT OF DECEMBER 7, 1943, THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS BECAUSE THE JOINT VENTURE AGREEMENT WAS EXECUTED SUBSEQUENT TO THE BOND AND BOND APPLICATION AND BECAUSE APPELLEE WAS NOT A PARTY TO THE JOINT VENTURE AGREEMENT AND NEVER ACCEPTED IT OR ACTED UPON IT.

As stated above, it was held by the lower Court that there was no liability in favor of use plaintiff with respect to the contract of December 7, 1943. In any event there could have been no liability in favor of Continental as against Appellants Goerig and Philp with respect to this contract because Goerig and Philp had not entered into the joint venture agreement with the Macri partners until after the execution of the bond application and bond which related to the December 7, 1943 contract. In other words, Goerig and Philp were not parties to the indemnity clause upon which Appellee's cross-complaint must be based. Likewise, Appellee was not a party to the joint venture agreement and accordingly has no right of action thereupon. Appel-

lee may not sue upon the joint venture agreement as a third party beneficiary because it was not accepted or acted upon by Appellee prior to the time of its recision and termination.

In this connection the argument hereinabove made at p. 25-28, Sect. E (3) is fully applicable and is hereby incorporated herein by reference.

F. Conclusion:

We submit that the above authorities conclusively establish that in case No. 11725 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

Case No. 11724

A. Factual Statement:

Case No. 11724 involved only the contract of May 18, 1944. The complaint of the use plaintiff was based upon the furnishing of materials in connection with the carrying out of this contract for which payment had not been made. The defendants, as in the previous cases, were the Macri partners, Appellants Goerig and Philp, and the Continental Casualty Co., which furnished the payment bond in connection with the contract.

The Continental Casualty Co., as in the previous cases, filed a cross-complaint against the Macri partners and against Goerig and Philp upon the basis of the indemnity provision contained in the bond application.

The bond application and bond involved in No. 11724 were those heretofore discussed in connection with the contract of May 18, 1944. Similarly, the joint venture agreement and the termination thereof are those referred to hereinabove in connection with the discussion of the May 18, 1944 contract.

These instruments have been discussed in detail in the foregoing consideration of case No. 11726 (p. 8-9, Sect. A (2)).

By way of summarization the significant dates are set forth in the following table:

Contract Relating to Specification No. 1068

December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

January 26, 1945, to June 13, 1945—Period of furnishing labor and materials by use plaintiff.

B. The Judgment of the Lower Court:

In Case No. 11724 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners. As against Appellants Goerig & Philp the use plaintiff's cause of action was dismissed (Tr. 11724—27-29).

Although no recovery was allowed the use plain-

tiff as against Appellants Goerig & Philp, the Appellee, Continental Casualty Co., was awarded judgment on its cross-complaint both as against the Macri partners and as against the aforesaid Appellants. This judgment was in the amount of $4,994.68. It is to be noted that this amount relates solely to materials furnished by the use plaintiff to Macri & Co. after the termination of the joint venture agreement between the Macri partners and Appellants (Tr. 11724—22).

C. Specification of Errors Relied Upon:

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the further reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the materials furnished by use plaintiff for which payment was not made were supplied in connection with the contract of May 18, 1944 (Specification No. 1068), and the joint venture agreement between Appellants Goerig and Philp and the Macri partners was terminated prior to the furnishing of materials in such connection.

3. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants were held to be not liable to the use plaintiff for the materials and labor furnished by him; and, accordingly, Appellants may not be held liable to Continental because an indemnitor may not be held liable to his indemnitee where the acts of the former did not cause payment by the latter under the surety clause.

The foregoing specifications are included in the statement of points on appeal which is set forth at page 34 of the Transcript of Record in case No. 11724.

D. Summary of Argument:

(1) This case involves the contract of May 18, 1944. The bond in this case was furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit or performance of the person who applies for the bond and may look only to him for indemnity.

(2) In this case no materials were furnished by

the use plaintiff until after the termination of the joint venture agreement between the Appellants and the Macri partners. A partner is not liable for the acts of his former partners which take place subsequent to the dissolution of the partnership. Since the relationship between Appellants and the Macri partners was secret, and the Appellants were merely dormant partners, it was not necessary for them to give notice of the termination or dissolution of the joint venture agreement. Accordingly, the lower Court correctly held that there was no liability in favor of the use plaintiff and against Appellants. It follows that Continental has no right of action over against these Appellants, for it is well settled that a judgment of dismissal against an indemnitor precludes the surety from recovering over against him.

E. Argument:

(1) The Court Erred in Entering Judgment Against Appellants for the Reason That Appellants Were Not Parties to the Indemnity Contract Upon Which Appellee's Action Is Based.

Appellants Goerig and Philp were not parties to the bond or bond application relating to the contract of May 18, 1944, which is the only contract involved in this case. Accordingly, we submit that there is no basis for any judgment against Appellants. In this connection we hereby incorporate

herein by reference the argument heretofore made at p. 14-16, Sect. E (1).

(2) THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE JOINT VENTURE AGREEMENT HAD BEEN TERMINATED AND DISSOLVED PRIOR TO THE TIME OF FURNISHING LABOR AND MATERIALS TO USE PLAINTIFF.

As shown by the foregoing table of dates, the use plaintiff in this case did not furnish materials to the Macri partners until the joint venture between the Macri partners and Appellants had been terminated. Since a dormant partner is not liable for the acts of his former associates after his withdrawal from a partnership, the lower Court correctly dismissed the action of the use plaintiff as against Appellants Goerig and Philp; and since these Appellants were not liable to the use plaintiff it follows that they could not be liable to the surety on the indemnity clause of the bond application. In this connection we hereby incorporate herein the argument made hereinabove at p. 17-25, Sect. E (2) (a) and (b).

F. Conclusion:

We submit that the above authorities conclusively establish that in case No. 11724 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

Case No. 11722

A. Factual Statement:

In case No. 11722 the action of the use plaintiff was based upon the furnishing of materials to the Macri partners in connection with the carrying out of the contract of May 18, 1944. The complaint alleged that payment for these materials had not been made and named as defendants the Macri partners, Appellants Goerig and Philp, and the Continental Casualty Co., which had furnished the payment bond required by the Miller Act.

The Continental Casualty Co., as in the previous cases, filed a cross-complaint against the Macri partners and against Appellants Goerig and Philp upon the basis of the indemnity provision contained in the bond application.

The joint venture agreement and the contract terminating this agreement are those previously discussed herein. The termination of the said joint venture agreement took place prior to the delivery of materials by the use plaintiff in this case. (Tr. 44-45).

These instruments have been discussed in detail in the foregoing consideration of case No. 11726, p. 8-9, Sect. A (2).

By way of summarization the significant dates are set forth in the following table:

Contract Relating to Specification No. 1068

December 11, 1943—Date of joint venture agreement.

May 18, 1944—Date of principal contract between Macri & Co. and Bureau of Reclamation.

May 18, 1944—Date of bond application and bond.

July 15, 1944—Date of termination of joint venture agreement.

May 1, 1945, to October 30, 1945—Period of furnishing labor and materials by use plaintiff.

B. The Judgment of the Lower Court:

In Case No. 11722 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners, but dismissed the action of the use plaintiff as to Appellants Goerig and Philp (Tr. 48-49).

As in the previous cases, despite the dismissal of the use plaintiff's action against Appellants, a judgment was entered against them upon the cross-complaint of the surety company. This judgment was in the amount of $3,842.83 (Tr. 48).

C. Specification of Errors Relied Upon:

The specification of errors relied upon by Appellants in case No. 11722 are the same as those relied upon in case No. 11724. These specifications are set forth hereinabove at page 39-40 and are hereby incorporated herein by reference. The said specifications are included in the statement of points on appeal which are set forth on page 53 in the Transcript of Record in case No. 11725.

D. Summary of Argument:

The argument heretofore made with respect to case No. 11724 is applicable in its entirety to case No. 11722. Accordingly, the summary of the argument made in connection with case No. 11724 is hereby incorporated by reference as the summary of argument in case No. 11722.

E. Argument:

The argument heretofore made with respect to case No. 11724 is applicable in its entirety to case No. 11722. Said argument is hereby incorporated herein by reference and shall be deemed to be Appellants' argument with respect to case No. 11722.

F. Conclusion:

We submit that the above authorities conclusively establish that in case No. 11722 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

Case No. 11723

A. Factual Statement:

In Case No. 11723 the use plaintiff sued to recover for materials furnished to the Macri partners in connection with the carrying out of the May 18, 1944 contract. The defendants were the same as those named in the previous cases, namely, the Macri partners, Appellants Goerig and Philp and the Continental Casualty Co. Continental, as in the previous cases, filed a cross-complaint against the

Macri partners and against Goerig and Philp upon the basis of the indemnity provision contained in the application for the bond which was required under the Miller Act.

The bond application and bond involved in No. 11723 were those heretofore discussed in connection with the contract of May 18, 1944. Similarly, the joint venture agreement and the termination thereof are those referred to above in connection with the discussion of the May 18, 1944 contract.

These instruments have been discussed in detail in the foregoing consideration of case No. 11726 (p. 8-9, Sect. A (2).

B. The Judgment of the Lower Court

In case No. 11723 the lower Court entered judgment in favor of the use plaintiff and against the Macri partners *and against Appellants Goerig and Philp.* (Tr. 11723—30-32). This case is significant in that it is the only one of the five cases involved in these appeals in which judgment was entered against Appellants and in favor of the use plaintiff. The theory of the lower Court in entering judgment against Appellants and in favor of the use plaintiff in this particular case was that the materials which were furnished by the use plaintiff were furnished pursuant to a contract between Macri & Co. and the use plaintiff which was entered into during the existence of the joint venture agreement between Macri & Co. and Appellants. In this connec-

tion, it is the position of Appellants that there is no evidence whatsoever in the record which would warrant the conclusion that any of the materials were supplied during the existence of the said joint venture agreement or pursuant to any contract made during the existence of said agreement.

Judgment was also entered against Appellants Goerig and Philp and in favor of the Continental Casualty Co. in the amount of $7,262.91 (Tr. 11723—30-32). In view of the judgment against Appellants and in favor of the use plaintiff, the appeal in this case has been perfected as to both Continental and the use plaintiff (Tr. 11723—32-43).

C. Specification of Errors Relied Upon:

1. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that Appellants did not sign and were not parties to the application for the bond furnished by Appellee, and were not parties to the bond itself, and for the further reason that the Appellee did not rely upon the credit or security of Appellants and did not know that they were at any time connected with the Macri partners.

2. The Court erred in entering judgment against Appellants and in favor of the use plaintiff for the reason that there was no evidence whatsoever which would support the conclusion of the lower Court that the materials furnished by the use plaintiff were supplied in connection with any contract

or agreement which was made during the existence of the joint venture agreement between Appellants and the Macri partners.

3. The Court erred in entering judgment against Appellants and in favor of Continental for the reason that the judgment against Appellants and in favor of the use plaintiff was erroneous; and if Appellants were not liable to the use plaintiff they could not have been liable to Continental on the basis of the indemnity clause of the bond application.

The foregoing specifications are included in the statement of points on appeal which is set forth at page 36 of the Transcript of Record in case No. 11723.

D. Summary of Argument:

(1) This case involved the contract of May 18, 1944. The bond in this case was furnished solely upon the personal application of the Macri partners. Neither of the Appellants was a party to the bond application or to the bond itself. It is well settled that a bonding company may enforce an indemnity provision only against one who applies for the bond, even though the applicant may have sought the bond to guarantee performance of a partnership of which he is a member. The rule to this effect is based upon the principle that in contracts of indemnity the surety relies upon the credit or per-

formance of the person who applies for the bond and may look only to him for indemnity.

(2) In this case the judgment against Appellants and in favor of use plaintiff was based upon the theory that the materials furnished by the use plaintiff to Macri & Co. were furnished pursuant to a contract entered into between the use plaintiff and Macri & Co. during the existence of the joint venture between the Macri partners and Appellants Goerig & Philp (Tr. 11723—24-25). There is no evidence whatsoever to support this conclusion. The complaint of the use plaintiff (Tr. 11723—9) admits that materials were not delivered until July 1944, and the joint venture agreement between the Macri partners and Appellants was terminated on July 15, 1944. There is no evidence to support the conclusion that these materials were furnished pursuant to a contract entered into prior to this termination agreement. Accordingly, the judgment in favor of use plaintiff and against Appellants was erroneous. It follows that the judgment in favor of Continental Casualty Co. and against Appellants is also erroneous, for if Appellants were not liable to the use plaintiff they could not be liable to Continental on the basis of the indemnity clause.

E. Argument:

(1) The Court Erred in Entering Judgment Against Appellants for the Reason That Appellants Were Not Parties to the Indemnity Con-

TRACT UPON WHICH APPELLEE'S ACTION IS BASED.

Appellants Goerig and Philp were not parties to the bond or bond application relating to the contract of May 18, 1944, which is the only contract involved in this case. Accordingly, we submit that there is no basis for any judgment against Appellants. In this connection were herby incorporate herein the argument heretofore made at p. 14-16, Sect. E (1).

(2 THE COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANTS FOR THE REASON THAT THE EVIDENCE DOES NOT SUPPORT THE JUDGMENT AGAINST APPELLANTS AND IN FAVOR OF USE PLAINTIFF; AND IF APPELLANTS WERE NOT LIABLE TO THE USE PLAINTIFF THEY COULD NOT BE LIABLE TO THE SURETY COMPANY.

As demonstrated in the foregoing argument, a silent or dormant partner is not liable for the acts of his associates after his withdrawal from the partnership (p. 18-21, Sect. E (2) (a)). On the basis of this principle, in all of the cases discussed previously, the Court dismissed the action of the respective use plaintiffs as against Appellants for the reason that the action in each of these cases was based upon acts of Macri & Co. after Appellants had withdrawn from the joint venture agreement. In the instant case the Court concluded that the use plaintiff was entitled to judgment against Appellants on the theory that the materials which were

furnished by the use plaintiff were supplied pursuant to a contract which was made during the existence of the joint venture agreement. We submit that there was no evidence whatsoever which could possibly support this conclusion. Accordingly, on the basis of the principle applied by the Court in the cases previously discussed, this judgment against Appellants and in favor of the use plaintiff is entirely erroneous.

It follows that the judgment in favor of Continental and against Appellants is also erroneous for the reasons herein discussed above at p. 17-25, (Sect. E (2) (a) and (b). The said sections are hereby incorporated herein by reference.

F. Conclusion:

We submit that the above authorities conclusively establish that in case No. 11723 the judgment of the lower Court against Appellants and in favor of Appellee was erroneous in its entirety.

Respectfully submitted,

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